



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CR. PETITION NO. 29 OF 2020**

**PHILIP KIPTOO KORIR.....1<sup>ST</sup> PETITIONER**

**PETER KIPROTICH SIGILAI.....2<sup>ND</sup> PETITIONER**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

The Petitioners, **PHILIP KIPTOO KORIR** and **PETER KIPROTICH SIGILAI** were convicted for the offence of **Robbery with Violence**, contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**.

1. Each of the Petitioners was then sentenced to suffer Death as by law prescribed.
2. They have now petitioned this court for re-sentencing.
3. Essentially, the Petitioners are entitled to seek an order for re-sentencing if they can demonstrate that the trial court had failed to give due consideration to the particular circumstances of their case.
4. As the Petitioners have pointed out, it is imperative that the trial court does exercise its discretion when handing down an appropriate sentence, so that the said sentence is individualized.
5. The Petitioners appreciate the need for the Court to take into account factors such as their respective characters.
6. In order to enable the Court evaluate the factors attendant to each of the Petitioners, it was necessary for the Court to critically analyze the circumstances in which the offence was committed.
7. The Petitioners needed to provide this court with the record of the proceedings before the trial court.
8. A perusal of the record of the proceedings would inform the Court about the roles played by each of the Petitioners, as well as the impact that the said actions had upon the Complainant.
9. It is important to note that the Death Penalty was still lawful in Kenya, as pronounced by the Supreme Court in the case of **FRANCIS KARIOKO MURUATETE & ANOTHER Vs REPUBLIC, PETITION NO. 15 OF 2015**. Therefore, in order to determine whether or not the circumstances prevailing in this case were such that they justified the Death Penalty, this Court would have to re-evaluate the record of the proceedings from the trial court.
10. Secondly, when carrying out the process of re-evaluation of the proceedings, this Court would verify whether or not the trial court provided to the Petitioners an opportunity for mitigation.
11. If the Petitioners put forward their respective mitigation, I would then need to consider whether or not the trial court took into account the said mitigation.
12. It was only when the Petitioners demonstrate to this Court that the trial court handed down the Death penalty on grounds that that was the mandatory sentence, that this Court could order for re-sentencing.

13. The Petitioners failed to demonstrate to this Court that the trial court failed to take into account relevant factors when determining the sentence which it handed down.
14. I have noted that Peter Kiprotich Sigilai is on treatment for Osteoarticular Tuberculosis of his right shoulder.
15. He told the court that he would not wish to transmit the disease to any other persons. In his view, the congested prison facilities provided an opportunity for transmission of the disease.
16. As the Petitioner had not provided this Court with his medical records, and because the Court was extremely concerned about the possible adverse impact on other inmates, I called for the medical reports.
17. Sgt. Patrick Kibor, who is a Clinical Officer at the Kisumu Maximum Prison, wrote a letter dated 8<sup>th</sup> March 2021, confirming that Peter Kiprotich Sigilai has suffered from tuberculosis since 28<sup>th</sup> August 2020.
18. When the Court asked Sgt. Kibor if the disease was infectious, he explained that the tuberculosis of the bones, which Peter was suffering from, was not infectious.
19. I do not know whether or not Peter had already known that the disease was not infectious. If he had been aware of that fact, that would imply that he had deliberately tried to mislead the Court, with a view to earning more empathy than he deserved.
20. However, it is equally possible that Peter had genuinely believed that his condition was infectious. Therefore, I will not hold it against him.
21. Both Petitioners have told this Court that they were now rehabilitated and reformed. Each of them would wish to re-unite with his family.
22. Whilst I appreciate their desire to be re-united with family, after being in prison custody for six (6) years, I find that that is not a reason to warrant re-sentencing.
23. As regards the provisions of **Section 333 (2)** of the **Criminal Procedure Code**, the Court is obliged to take into account the period which an accused person spent in custody whilst he was still undergoing trial. Therefore, if the Petitioners were in custody during their trial, their sentences ought to be discounted by the period which they spent in custody.
24. However, in the absence of the record of the proceedings from the trial court, this Court is unable to specify the period by which the sentence ought to be discounted.
25. In the result, the absence of the record of proceedings from the trial court renders it impossible for this Court to either re-sentence or to give directions on the duration by which custodial sentence should be discounted. Therefore, the Petition is dismissed.

**DATED, SIGNED AND DELIVERED AT KISUMU**

**THIS 7TH DAY OF JULY 2021**

**FRED A. OCHIENG**

**JUDGE**